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No. 90-1803

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Supreme Court of the United States

OCTOBER TERM, 1991

PAUL A. BILZERIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

ARTHUR F. MATHEWS *
STEPHEN H. SACHS
LOUIS R. COHEN
JOSEPH K. BRENNER
W. HARDY CALLCOTT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner
* Counsel of Record

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REPLY BRIEF FOR PETITIONER

Petitioner Paul A. Bilzerian respectfully submits this reply brief in support of his petition for a writ of certiorari.

1. Petitioner was charged with specific intent crimes. Because of the ruling below on the attorney-client privilege issue, petitioner was unable to assert his good faith in response to those charges without waiving his privilege as to confidential attorney-client communications. That important error is worthy of the Court's review, and none of the government's arguments answers our showing on this point.

a. The issue is undeniably important. This Court recently affirmed that a defendant's testimony that he acted in good faith (even if objectively unreasonable) is, if the jury believes it, a complete defense against a charge of

willful violation of the law. *Cheek v. United States*, 111 S. Ct. 604, 610-11 (1991). By conditioning the assertion of such testimony on waiver of the attorney-client privilege, the rule announced below would effectively prevent defendants from testifying as to good faith in the large majority of cases in areas (such as securities regulation) where defendants "constantly go to lawyers to find out how to obey the law." *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981).[1]

b. The government appears to be making the extraordinary argument (Opp. at 15-18) that a defendant's testimony waives his attorney-client privilege as to any attorney-client communication that might be *relevant* to that testimony. But relevance has never been and cannot be the test for waiver of the attorney-client privilege. The privilege has always protected attorney-client communications precisely because they have "sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice." E. Cleary, *McCormick on Evidence* § 72 (3d ed. 1984).[2]

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[1] The government's assertion—made without any supporting argument or authority (Opp. at 2 n.1)—that reversal on the attorney-client privilege issue would not result in a reversal of all counts of the conviction is wrong. The trial court's error prevented petitioner from exercising his fundamental right to tell the jury that he did not intend to violate the law, *see Cheek*, 111 S. Ct. at 611, and to explain the crucial changes he made in his tender offers in an attempt to comply with the law. By preventing petitioner from responding to the government's key allegations, the rulings devastated both the substance of his defense and his credibility as a witness. Trial errors affecting the credibility of the defendant are particularly likely to be harmful, *see United States v. St. Clair*, 855 F.2d 518, 523 (8th Cir. 1988); *United States v. Dwyer*, 843 F.2d 60, 64 (1st Cir. 1988); *United States v. Matias*, 836 F.2d 744, 749-50 (2d Cir. 1988); *United States v. Eisenstein*, 731 F.2d 1540, 1546 (11th Cir. 1984), and demand reversal on all counts even if they directly affect testimony only on some counts. *Olender v. United States*, 210 F.2d 795 (9th Cir. 1954).

[2] *See Upjohn*, 449 U.S. at 396 (considerations of relevance "do not overcome the policies served by the attorney-client privilege"); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494

A holding that relevance is the test for waiver of the attorney-client privilege would eviscerate the privilege.

The government relies on cases concerning the privilege against self-incrimination (Opp. at 15), but that is a privilege not to testify, and by taking the stand the defendant obviously waives his general right not to give relevant testimony against himself. Settled law holds that the attorney-client privilege is waived only by putting a privileged *communication* in issue, either by revealing its substance in part or relying on its existence as a defense.[3] Petitioner sought to do neither.

The government (Opp. at 18) attempts to distinguish *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), on the ground that White sought only to deny criminal intent, while petitioner sought affirmatively to assert good faith. That is a distinction without any difference. As this Court recognized in *Cheek*, 111 S. Ct. at 611, if the

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(9th Cir. 1989) (existence of attorney-client privilege does not depend on balancing of privilege against other factors such as relevance).

[3] Pet. at 9-10. The attorney-client privilege cases cited by the government (Opp. at 16 n.8) all involved situations where the holder of the privilege affirmatively put the privileged communication in issue, for instance by asserting defective advice from counsel, *United States v. Woodall*, 438 F.2d 1317 (5th Cir. 1970) (en banc), *cert. denied*, 403 U.S. 933 (1971), or asserting reliance on advice of counsel, *Hunt v. Blackburn*, 128 U.S. 464 (1888). Here, the proffered testimony would not have referred to the existence or contents of any communications with counsel, and petitioner offered to stipulate that he was not asserting an advice of counsel defense (Pet. at 5). Petitioner sought only to deny the government's allegation that he had *willfully* violated the law.

As the government concedes (Opp. at 7), the jury knew that petitioner had consulted with counsel *only* because the government itself had introduced that evidence during its case-in-chief. The introduction of evidence by one party cannot force the waiver of the opposing party's attorney-client privilege. *See Parker v. Prudential Ins. Co.*, 900 F.2d 772, 776 n.3 (4th Cir. 1990); *Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987).

jury believes a defendant's claim of good faith, then the government has not carried its burden of proving criminal intent. The jury in this case was so instructed. *See* Tr. at 3373 ("The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt").[4] The decision below—which prevented petitioner from offering evidence on this crucial issue—is contrary to logic, contrary to precedent, and worthy of review.

c. The weakness of the government's argument on the privilege issue is illustrated by its primary reliance on Judge Lombard's concurring argument, *not* adopted by the panel majority, that the issue was not properly preserved for post-trial review (Opp. at 13-15). By contrast, the district judge addressed the privilege issue on the merits in his denial of petitioner's motion for new trial (App. at 37a-39a),[5] as did the panel majority on appeal (App. at 8a-13a).[6] Although the government misleadingly cites certain of the trial judge's remarks during preliminary discussions of the issue (Opp. at 8-10), the record is clear that at the end of each argument concerning the privilege, the court made a definitive, final ruling that petitioner's proposed testimony would constitute waiver (*e.g.*, Tr. 2422, 2443-45, 2947-49).

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[4] Moreover, nothing in the *White* opinion turns on the defendant's failure to take the stand. Rather, *White* turns on the fact that the defendant—exactly like petitioner here—"refrained from relying on any statements of counsel and expressly disavowed any intent to rely on an advice-of-counsel defense." 887 F.2d at 270.

[5] The district judge also stated repeatedly during trial that the privilege issue had been properly preserved for appellate review (Tr. 2352, 2732).

[6] The majority (App. at 11a) noted, in its attempt to distinguish *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), that petitioner had not ultimately testified concerning the privilege communications, but the majority never suggested that the issue had not been properly preserved for review.

Many courts, including this Court, have reviewed similar *in limine* rulings concerning the application of a privilege.[7] This Court's Proposed Federal Rule of Evidence 513(b) said that privilege issues *should* be raised *in limine*. Judge Lombard's position would require a party to waive the attorney-client privilege, and lose forever the confidentiality of the protected communication, in order to preserve the issue for appeal. That result would wholly distort this Court's ruling in *Luce v. United States*, 469 U.S. 38 (1984).[8]

2. The government concedes that "the circuits are in conflict" (Opp. at 21) on whether materiality is an essential element of the Section 1001 false statement offense. In nonetheless arguing against review by this Court, the government erroneously claims that the issue "has no effect on this case" (Opp. at 21); the government bases this claim on post-hoc speculation about what *might* have happened below *if* the trial court had considered whether the alleged false statements were material. But it is undisputed (Opp. at 23) that the court did not consider that question.[9] Accordingly, if this Court were to hold

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[7] *See, e.g., United States v. Nobles*, 422 U.S. 225, 241 (1975); *Parker v. Prudential Ins. Co.*, 900 F.2d 772, 775 (4th Cir. 1990); *Wylie v. Marley Co.*, 891 F.2d 1463, 1470-71 (10th Cir. 1989); *Allstate Ins. Co. v. James*, 845 F.2d 315, 320 (11th Cir. 1988).

[8] There are other important reasons why the rationale of *Luce* does not apply here. Petitioner raised the privilege issue in this case during trial, at a point when the trial judge was intimately familiar with the record, not before trial as in *Luce*. The D.C. Circuit recently declined to apply *Luce* in similar circumstances, holding that the specter of the pretrial "planting" of reversible error—which drove the decision in *Luce* and is argued by the government here—is "farfetched" in the context of a mid-trial motion *in limine*. *United States v. Pryce*, No. 89-3124, slip op. at 7-8 (D.C. Cir. July 16, 1991).

[9] Moreover, as petitioner contends and the Ninth Circuit has held, the question of materiality is for the jury, not the trial court. *See United States v. Clark*, 918 F.2d 843, 846 (9th Cir. 1990). And contrary to the government's passing suggestion (Opp. at 22 n.14),

that a finding of materiality is required, petitioner's Section 1001 convictions would have to be overturned.[10]

3. The government (Opp. at 23-24) does not answer the central point made by Judge Winter's dissent below. Judge Winter did not dispute the general maxim (relied on by the government) that criminal statutes, including Section 1001, can overlap. But he correctly reasoned that whether the government can prosecute under Section 1001, instead of a specific criminal statute such as Section 32(a) of the 1934 Act, is purely a question of congressional intent. Given the protections Congress carefully provided for defendants under the 1934 Act, it makes no sense to argue that Congress, without discussion, intended to remove all those protections only twelve days later when it enacted Section 1001 (App. at 35a-36a). The government's attempt to circumvent the strict proof requirements of Section 32(a) is contrary to congressional intent and worthy of this Court's review.

4. The government concedes (Opp. at 26) that the doctrine announced by the Sixth Circuit in *United States v. Minarik*, 875 F.2d 1186 (6th Cir. 1989), but rejected by the Second Circuit below, merits review The government tries to argue (Opp. at 26-27) that petitioner's conviction would not be affected by adoption of the Sixth Circuit rule. But in so doing the government wrongly characterizes the *Minarik* doctrine as it is understood by the Sixth Circuit itself. In *United States v. Gibson*, 881 F.2d 318, 320 n.1 (6th Cir. 1989), the court stated that: "We recently held that 'conspiracies to commit specific offenses

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whether materiality must be decided by the court or the jury is "fairly included" within the questions presented to this Court. *See* S. Ct. R. 14.1(a); *Pulliam v. Allen*, 466 U.S. 522, 528 & n.5 (1984).

[10] *See, e.g., Boyde v. California*, 110 S. Ct. 1190, 1197-98 (1990) (where jury's general verdict may have rested on impermissible ground, conviction must be set aside); *Mills v. Maryland*, 486 U.S. 367, 376 (1988) (same); *Street v. New York*, 394 U.S. 576, 586-87 (1969) (same for trial court's general verdict).

(which are also arguably general frauds)' must be prosecuted 'exclusively under the offense clause of § 371. . . . [quoting *Minarik*].'" Here, petitioner was charged with conspiracy to commit specific offenses but was *not* charged exclusively under the offense clause of Section 371. The decision below squarely conflicts with the decisions of the Sixth Circuit on an issue that the government concedes warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR F. MATHEWS *
STEPHEN H. SACHS
LOUIS R. COHEN
JOSEPH K. BRENNER
W. HARDY CALLCOTT
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000
Counsel for Petitioner

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* Counsel of Record